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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 839

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION,

Petitioner,

v.

JOSEPHINE MESSINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN JOSEPH LEAHY

[illegible]

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mutual Benefit Health and Accident Association, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on June 3, 1965, as amended by an order dated June 8, 1965, to which a petition for rehearing was filed on July 3, 1965, and which was denied by an order dated September 23, 1965.

OPINIONS BELOW

The opinion of the court below (App. 11-19) is reported at 350 F.2d 453. The memorandum opinion and judgment of the District Court on the merits (App. 20-32) is reported at 228 F.Supp. 865.

JURISDICTION

The judgment of the court below (App. 11-19) was entered on June 3, 1965. The denial of the motion for rehearing, timely filed on July 3, 1965, was entered on September 23, 1965. (R. 158) The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Circuit Court correctly held, in the teeth of many contrary decisions of this Court, and of other Circuit Courts, that an employee of the United States who admittedly did not have actual authority to contract on behalf of the Government for an air taxi flight may, by his apparent authority, justify an air taxi flight purchaser's reliance upon the said employee's authority to contract in behalf of the Military Air Transport Service of the United States (MATS) for such a flight, thereby allegedly making his said flight a covered one under his insurance policy which included flights "by, or contracted for by, MATS."

2. Whether in ruling on a case that has wide and continuing significance to an important aspect of airline travel, the Circuit Court departed from the accepted and usual course of judicial proceedings in affirming, in the words of the dissenting judge, "without undertaking any analysis of the issues."

3. Whether the courts below were correct in holding that the construction and interpretation of a contract of insurance purchased in Japan is to be governed by a transcendental "American Contract law," rather than by the substantive law of a specific state or foreign nation.

STATEMENT

This case in short[1] involves a suit on an insurance policy entered into in Japan between Respondent's husband, Salvatore Messina, and the Petitioner insurance association, whereby Mr. Messina was insured in the now familiar air travel accident insurance policy.

The insured, a civilian employee of the Department of the Army, traveling on government travel orders covering passage to a suburb of Washington, D.C., purchased the policy from an agent of Petitioner at Tachikawa Air Force Base, Japan. (App. 11) The policy, as far as it is here pertinent, insured Mr. Messina's life "while a passenger on scheduled air lines and other specified conveyances." (Bold face type at top of first page of policy. App. 1) At the time, the insured was ticketed only to Travis Air Force Base, California, and it so happened that that leg of his journey was aboard a commercial carrier flight contracted for by the Military Air Transport Service (MATS). (App. 12)

Upon his arrival at Travis, Messina obtained a government transportation request and, with it, a booking for a flight from San Francisco to Washington via United Airlines, a scheduled carrier. To get to San Francisco he chose to purchase with $15 of his own money a ticket for an air taxi flight operated by the Travis Transportation Company, a nonscheduled air taxi carrier. (App. 12) This type of carriage was not included in his travel orders or the Government transportation request. The air taxi crashed, resulting in his death.

The Respondent's complaint alleged that Messina lost his life in a covered flight. (R. 1-2)[2] Through interrog-

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[1] A judicial discussion of the case will be found in the nine page dissenting opinion of Judge Burger. (App. 12-19)

[2] "R", followed by numerals, refers to the page in the record from the Circuit Court of Appeals below.

atories it was admitted by her that the alleged covered flight was one referred to as type "(d)" in the insuring clause of the policy, *viz.*, one "contracted for by MATS." (R. 7) It was agreed and found that none of the other types of flights applied. (App. 24)

At trial the Respondent put in evidence a document expressly designated a "Revocable Permit" issued by the Base Commander, Travis Air Force Base, for and on behalf of the United States, to the said air taxi carrier, approved by Charles W. Stark, Colonel, U.S.A.F., Commander. (App.3-10) She also showed that, at the time, Colonel Stark was assigned to MATS. It was also established however that other commands of the U.S.A.F. were occupying the base, S.A.C., A.T.C., etc., (R. 73) and that MATS at the time simply happened to be assigned the maintenance function of "host" command in addition to its basic function of providing air transportation to military personnel and material. (App. 13)

Less than a year before, S.A.C., the Strategic Air Command of the United States Air Force, completed an assignment of these same "housekeeping chores." (App. 13-14)

Although the Petitioner adduced no evidence at trial, the Respondent herself put into the record three depositions taken by the Petitioner. These included the testimony of Lt. General Joe W. Kelly, Commandant of MATS, and William S. Jamieson, president of the air taxi carrier. In his deposition General Kelly stated that the fatal flight was not contracted for by MATS (R. 64-65), and that Colonel Stark had no authority to contract on behalf of MATS for such a flight as the fatal one herein. (R. 64) The president of the air taxi carrier in his deposition asserted that he had no contract with MATS. (R. 52-53; App. 14)

The Respondent neither pleaded nor raised at trial any question of an ambiguity in the policy. Neither did she elect to base her right to recover in accordance with the

law of any jurisdiction (App. 24). After introducing, over objection, evidence tending to show that the air taxi carrier was required to approach the air base from a higher altitude than the Civil Aeronautics Board required of an interstate commercial carrier (R. 103), and evidence of the possible recovery by the deceased from his employer of the $15 expended for the fatal flight ticket (R. 75-81), the Respondent rested. The Petitioner stood on its Motions to Dismiss and for Judgment in its favor. (R. 84)

In a Memorandum opinion, the District Court, restated the issue to be "whether the fatal flight was "a regular, special or chartered flight * * * contracted for by, the Military Air Transport Service (MATS) * * *, since none of the other specified types of flights applies." (App. 24) It then mentioned "the impression that the policy covered the continuous flight from Japan to Washington, D.C.", maintaining principally that "the reference to 'special' and 'chartered' flights would have led a reasonable person in Mr. Messina's position to believe that the air taxi flight was covered—unless some clear warning to the contrary can be discovered in the terms of the policy." (App.25)

Asserting that the warning stamped diagonally and in a different color on page one of the policy was difficult to read, the Court then held that "in the light of these considerations," interpreting the policy, "if the ordinary person in Mr. Messina's position had inquired whether the flight was or was not 'contracted for by MATS,' he would have been shown a document called a 'Revocable Permit'." After noting the passenger priority basis, the maximum prices to be charged its passengers from the air base, adherence to certain FAA and other operational requirements, to which the air taxi carrier agreed, the Court held that "there is benefit flowing to both parties—to the Air Taxi Service from the fares it can collect from persons flown from Travis; to the Base Commander (and MATS) from the quicker connections between air fields and the priority seating arrangements." (App. 29) This led finally to the conclusion therefore that "since the is-

sue in this case is whether a reasonable man would have been justified in relying upon the Base Commander's *apparent* authority (as distinct from actual authority) in 'contracting' in behalf of MATS" (App.30), "for the purpose of determining whether this flight was covered by the insurance policy, the flight was one 'contracted for by' MATS," (App. 30). (Italics supplied.)

On appeal to the United States Circuit Court of Appeals for the District of Columbia the Petitioner urged, inter alia, that the fatal air taxi flight was not contracted for by MATS, but by the decedent himself with $15 of his own money (App. 12); that the Revocable Permit did not constitute a contract between MATS and the air taxi carrier (App. 5); that if *arguendo* it were construed as one, it was not a contract for a flight covered by the policy sued on (App. 5); that the District Court improperly assumed that Japanese law contains the same governing principles of law of contracts as "American Contract law" and that its holding that "it need not decide which state law governs" (App. 24) was in conflict with the applicable decisions of this Court (R. 147), with the views of the other Circuit Courts of Appeals (R. 148), and with the law of the District of Columbia since 1831 (R. 145-146); and that the District Court's holding that the fatal flight was one "contracted for by MATS" because "a reasonable man would have been justified in relying upon the Base Commander's apparent authority (as distinct from actual authority) in contracting in behalf of MATS" was in conflict with the applicable decisions of this Court (R. 154).

In a thirteen line Per Curiam, a majority of the Division affirmed the judgment of the District Court. Because of the importance of the case and the failure of the majority to "undertake any analysis of the issues," however, Judge Burger, in a vigorous dissent devoted nine pages to a rectification of that failure. In so doing he scored the fallacy of the District Court's bringing the "Messina's possibly being misled" argument to the aid of its "taxi-license - as - MATS - contract theory." (App. 15-16) He

also noted that the critical issue of "whether MATS contracted for the fatal flight under the terms of the policy" was not resolved. (App. 5)

In a petition for rehearing, the Petitioner again emphasized the failure of the majority of the Division of the Circuit Court to analyze the issues herein (an award of interest was demanded and granted although the Respondent had accounted for considerable delay) despite the national importance of the case and the obvious affect this decision will have on the underwriting and actuarial bases of air travel insurance — so vital to the traveling public and the industry. (R. 156) Again this was rejected without comment except for the repeated disagreement of Judge Burger with his brethren. (R.129)

REASONS FOR GRANTING THE WRIT

This Court should grant this writ, if it does not reverse and order the entry of a judgment for the Petitioner, for at least four reasons:

(1) The decisions of the Circuit Court of Appeals (which by a majority of its Division affirmed without any analysis that of the District Court) is in conflict with a rule adhered to in all applicable decisions of this Court, and the other Circuits, that requires—for its validity by a government officer—express authority for the execution of a contract.

The ruling herein that the fatal flight was one "contracted for by MATS" was based upon the *apparent* authority of Colonel Stark to bind MATS in a contract for a flight such as the fatal one herein (App. 30) despite the complete absence of any showing of such express authority and the uncontradicted testimony of the head of MATS quoted above that he had none.

On appeal to the Court below, the Petitioner protested, to no avail, that express authority must be shown where it is alleged that a Government agent acted to bind his principal. (R. 155)

In *United States v. North American Co.*, 253 U.S. 330, this Court in an alleged condemnation case restated the said rule thus:

> In order that the government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized to do so, either directly by Congress, or by the official upon whom Congress conferred the power.

Similarly, as cited to the Court below, this Court in *Whiteside v. United States*, 93 U.S. 247, previously declared that:

> Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnished no excuse for any mistake or wrongful act.

Most recently this Court has in *Sutton v. United States*, 256 U.S. 575, declaimed:

> No contract can be implied from the acts or omissions of a government officer, if an express contract by him would have been unauthorized.

The decision below is also in conflict with the view of the Fourth Circuit which recently held in *United States v. Willis*, 164 F.2d 453, that:

> He who deals with an agent of the government must look to his authority, which will not be presumed but must be established. He cannot rely upon the scope of dealing or *apparent* authority as in case of private agent. Citing *Sutton v. U.S., supra*, and *The Floyd Acceptances*, 7 Wall. 666, 677. (Italics supplied.)

Similarly, the holding below is in conflict with the following Circuit Courts of Appeals decisions:

D.C. Circuit: *Blake Construction Co. v. United States*, 296 F.2d 393; 3d Circuit: *R.F.C. v. Martin Dennis Co.*, 195 F.2d 698; 5th Circuit: *United States v. Holley*, 199 F.2d 575; 6th Circuit: *Fries v. United States*, 170 F.2d 726, cert. den., 336 U.S. 954; 7th Circuit: *Brubaker v.*

United States, 342 F.2d 655; 8th Circuit: *United States v. Hoffart*, 256 F.2d 186.

(2) This application presents an opportunity to this Court, in the exercise of its supervisory capacity over lower federal courts, to correct the failure of a majority of the Circuit Court Division to undertake any analysis (as stated by the minority member who filed a vigorous dissent) of a presented issue of wide and continuing importance; namely, in affirming without discussion a holding of the District Court, ignoring the clear language of the policy which carefully and plainly limits its coverage to specified types of air flights, and to surface vehicles operated by or for covered airlines and airports for inter-airport transportation between connecting flights, it departed from the accepted and usual course of judicial proceedings and rewrote the insurance policy *sub silentio*.

The only issue in this case is whether the insurance policy covered the fatal flight. (App. 13) It is conceded that the said flight was not actually operated by MATS, thus limiting the issue to the portion of the policy dealing with flights "contracted for by MATS." (App. 13)

Nevertheless, despite the complete absence of "ambiguities" as an issue—it was neither pleaded nor raised at trial—the District Court in its Opinion, *sua sponte*, treated three words in the policy, "regular, special or chartered," qualifying the six specific types of flights enumerated immediately thereafter, as "ambiguous." The observation of dissenting Judge Burger that "if those provisions are ambiguous, there are no unambiguous insurance policies" (App. 15) is, of course, pertinent. But, more importantly, it emphasizes the departure from the accepted and usual course of judicial proceedings the courts have resorted to herein to inject and passively approve an "agonizingly strained interpretation" (App.16) into policy provisions entirely unrelated to the sole issue in the case in order to find for the Respondent.

So finding, without being asked, instead of resorting to the usual judicial procedure of applying appropriate rules of construction to the allegedly ambiguous words, the District Court concluded that the policy would have led a reasonable person in Messina's position to believe that the air-taxi flight was one "contracted for by MATS" unless some clear warning to the contrary can be discovered in the policy. Rejected, as insufficient, was the following admonition appearing in its largest type, and in green—a different color—stamped diagonally across its first page: "READ CAREFULLY: THIS POLICY IS LIMITED: TO AIRCRAFT ACCIDENTS: ON SCHEDULED AIRLINES."

The said conclusion also deviated from the ancient and universally accepted axiom, "expressio unius, exclusio alterius," which means literally that when the agreed covered hazards are specifically enumerated, all others are inferentially excluded.

This was only another stepping stone however to a sudden shift in the District Court's "reasoning." Having first dealt with the possibility of Messina's having been misled by the supposed ambiguities, the court, admittedly "in the light of" the allegedly misleading provisions, went on to conclude that the fatal flight was one contracted for by MATS because, "*if an ordinary person* in Mr. Messina's position *had inquired* whether the flight was or was not contracted for by MATS, he would have been shown a document called a Revocable Permit." (Italics supplied.) As Judge Burger noted however, the interpreted "proof" does not come to the aid of the premise. (App. 15-16)

The absurdity of such a basis for holding that the landing license was a contract ought to be so apparent that argument thereon should be superfluous. As Judge Burger remarked, it is hardly conceivable that Messina could have relied on a *private* arrangement for an air taxi service to use an air force base as amounting to a MATS contract within his insurance coverage; he simply would not have known of such arrangements. (App. 15-16)

Next, if he had asked the heads of either the carrier or MATS if the instrument was a contract he would have been told "No." The only evidence adduced at trial on the question was by them and they not only gave their negative opinions, but General Kelly, the Commandant of MATS, defined a MATS contract for airlift as a defined service the price therefor to be paid by the government. (R. 65)

The Respondent, over objection, raised the question about the *possibility* of Messina's having later recovered the $15 fare he paid, but she admitted that it might have been denied. (R. 81) But even if it were reimbursable the fact remains that the coverage of this type of hazard was not agreed to by the Petitioner. Only a particular flight contracted for (and agreed to be paid for) by MATS was bargained by the parties to the insurance policy. And no one other than Messina himself (and the air taxi carrier) contracted for the fatal flight. The decision of the majority of the Division of the Circuit Court which in a thirteen line Per Curiam affirmed the holdings of the District Court was in short the sanctioning of a judicial hold up which should not be countenanced by this Court in its supervisory capacity.

(3) These decisions, unsupported by any competent or material evidence, which ignore both the plain language of the policy and the canons of construction, if left undisturbed will seriously jeopardize the continued availability of economical short-term accident insurance coverage by the great portion of the air-traveling public and military personnel and their dependents who travel mainly on flights of scheduled carriers and those of the Military Air Transport Service of the United States.

This is a specific illustration of the extent of the national importance of the issue herein, present and increasing, for despite the readily measurable risks of travel on regularly scheduled and rigidly supervised airlines, the holding below pays no heed to the actuarial fac-

tors that enter into the obviously greater risks of the relatively unregulated non-scheduled air taxis. (App. 19)

As the dissenting judge observed, the decision now blankets the more hazardous nonscheduled travel under coverage obviously calculated on the risks of scheduled airlines. The only alternative to such a threat naturally would be to raise the cost of air travel coverage to all. The inevitable result of that would be the deprivation of such protection to many who need it most but could not afford it. This will particularly affect the many servicemen who every day now are being transferred to critical military posts in increasing numbers.

(4) The accepted and usual course of judicial proceedings was also departed from herein with respect to the conflict of laws question which arose by virtue of the fact that the policy was purchased in Japan. The manner in which the courts below decided this question ignored their duty to first look to the common law of the forum, and from that to determine the particular jurisdiction to which it should look for the applicable substantive law.

In failing to perform this duty, the courts below allowed the Respondent to recover without pleading or proving the substantive law of any jurisdiction, by applying alleged "American Contract law" which invoked the doctrine of "a transcendental body of law outside of any particular state" rejected by this Court in *Erie R. Co. V. Tompkins*, 304 U.S. 64.

The rulings herein that:

(a) "American Contract law will therefore be applied," (App. 24) and

(b) The court need not decide which American jurisdiction governs" (App. 24)

are violative of the decisions of this Court in *Klaxon v. Stentor*, 313 U.S. 487, and *Griffin v. McCoach*, 313 U.S. 498, which enunciate the rule that the

> Federal courts in diversity of citizenship cases are governed by the conflicts of laws rules of the courts of the states in which they sit. (Quoted from *Griffin*.)

In *Klaxon*, this Court reproved the Circuit Court of Appeals sitting in Delaware for its application of a New York statute pursuant to the Court's "independent determination of the 'better view' without regard to Delaware law." It did so in this language:

> We are of opinion that the prohibition declared in Erie R. Co. v. Tompkins, 304 U.S. 64, against such independent determinations by the federal courts, extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts.

And again, therein,

> It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of the conflict of laws.

The rulings herein which failed first to look to the law of the forum for a determination of what jurisdiction provides the Respondent with her substantive rights are, in addition, contrary to the views of all the Circuit Courts of Appeals including the District of Columbia, which have consistently followed said *Klaxon-Griffin* rule. *Boland v. Love*, 222 F.2d 27, D.C. Cir.; *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 2d Cir.; *Rutas Aereas Nacionales, S.A. v. Robinson*, 339 F.2d 265, 5th Cir.; *Myers v. Alvey Ferguson Co.*, 331 F.2d 223, 6th Cir.; *Muller v. Groban*, 346 F.2d 263, 7th Cir.; and *Glick v. Ballentine Products Inc.*, 343 F.2d 839, 8th Cir.

This principle indeed applies to all federal courts wherein jurisdiction in a given case is based upon a diversity of citizenship. The rule should be no different for the federal courts sitting in the District of Columbia, especially in a case such as the instant one in which all the requirements of diversity of citizenship are met. The

limitation of the application of this rule to diversity of citizenship cases is merely a convenient method of categorizing those cases in which the cause of action arose under the laws of some state or a foreign country, not under federal law. It was not intended that the rule of *Erie R. Co. v. Tompkins, supra,* be excluded from application in a case such as this which could have been entertained by any other federal court solely on this one jurisdictional basis.

Not only was the requirement that the appropriate substantive law be applied swept under the rug, but the court below failed to apply the said law of *any* particular jurisdiction as requested by Petitioner.

The rulings of *Erie, supra, West v. A.T. & T. Co.*, 311 U.S. 223, and *Huddleston v. Dwyer*, 322 U.S. 232, insist that:

> It is the duty of the federal appellate courts, as well as the trial courts, to ascertain and apply the state law where, as in this case, it controls decision. (Quoted from *Huddleston.*)

Implicitly this means the application of the substantive law of some particular state, as asserted by Judge Learned Hand in *Phelan v. Middle States Oil Corp.*, 220 F.2d 593, cert. den., *Cohen v. Glass*, 349 U.S. 929, wherein he said:

> . . . (The rights and liabilities of the parties) . . . depended upon the law of *some state* and not upon federal law. (Italics supplied.)

Clearly then, in failing to analyze the posture of this case as presented by the Respondent, the courts below decided the sole issue herein in her favor on the basis of federal common law; as revealed by the use of the term "American Contract law." This is in clear conflict with this Court's declaration in *Erie R. Co. v. Tompkins, supra,* that "There is no federal general common law."

The only exception written into that rule is one applicable to contracts entered into by the Federal government.

See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67. But that exception is narrow and precise. See *Bank of America v. Parness*, 352 U.S. 29; see also *United States v. Yazell*, 334 F.2d 454 (C.A. 5), certiorari granted 379 U.S. 957.

The body of law to which the District Court below looked for its substantive contract principles was not the law of the District of Columbia, nor that of any of the States, nor of Japan. Nor was it the federal common law of *Swift v. Tyson* or of *Clearfield Trust*. Rather it was to the general federal common law of *Swift v. Tyson*, 16 Pet. 1, characterized as "American Contract law" which was repudiated by this Court in *Erie v. Tompkins*, *supra*. The Court cited no precedent for the existence of this body of law, and, we respectfully submit, it could not do so, for none now exists.

One who contracts does so in view of the law of a particular jurisdiction. Language is drafted and rights and obligations are calculated upon the basis of the substantive law which all have presumed prevails. This is particularly so when rights and obligations are the basis of the calculations of risk and the setting of rates underlying the contract. Thus, we respectfully submit, the conflict of laws principle is too important to be so manifestly disparaged. A failure to determine the applicable rules of substantive law, whether they be the laws of Japan, Nebraska, Maryland, or of any particular jurisdiction, is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision to promote uniformity.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted, unless this Court sees fit to reverse the judgment of the Circuit Court and order the entry of a judgment for the Petitioner herein.

Respectfully submitted,

JOHN JOSEPH LEAHY

532 Munsey Building
Washington, D. C. 20004

Attorney for Petitioner

This Policy Is Nonrenewable and Provides Benefits for Loss of Life, Limb or Sight and Other Specified Losses Resulting from Accidental Bodily Injuries Received While a Passenger on Scheduled Airlines and Other Specified Conveyances or While on the Premises of an Airport to the Extent Herein Provided.

Assessment Association Account No. 1

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION

OMAHA, NEBRASKA

(Herein called the Association)

SCHEDULE Policy T6AV **No.** 18226 A

(PLEASE PRINT)

Insured's Name SALVATORE H. MESSINA

Street 4103 - 41 ST. City BRENTWOOD State MD

Beneficiary's Name JOSEPHINE L. MESSINA

Street SAME City WASHINGTON State DC

Point of Departure TAW Destination WASHINGTON DC ☐ And Return

Principal Sum $ 50,000 Effective Date 25 Jan 60 Premium $ 4.00

In consideration of the payment of the premium shown in the Schedule, the Association, subject to the provisions, limitations and exceptions of this policy, hereby insures the person named as Insured in the Schedule against loss of life, limb or sight and other specified losses resulting, independently of all other causes, from injuries. The term "injuries", wherever used in this policy, shall mean accidental bodily injuries received during any portion of the first one way or round trip which is made by the Insured, while this policy is in force, between the Point of Departure and the Destination designated in the Schedule and for which the Insured has purchased a transportation ticket or has been issued a pass; provided such injuries are received (1) while riding as a passenger in, boarding or alighting from, or by being struck by an aircraft operated on a regular, special or chartered flight (a) by a scheduled airline of United States Registry holding a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board of United States of America or its successors, (b) by an intrastate scheduled airline of United States Registry maintaining regular published schedules and licensed for the transportation of passengers by a duly constituted authority having jurisdiction over civil aviation in the state in which said airline operates, (c) by a scheduled airline of foreign registry maintaining regular published schedules and licensed for transportation of passengers by the duly constituted governmental authority having jurisdiction over civil aviation in the country of registry of such airline, (d) by, or contracted for by, the Military Air Transport Service (MATS) of the United States, (e) by the Royal Canadian Air Force Air Transport Command or the Royal Air Force Air Transport Command of Great Britain, or (f) by the 315th or 322nd Air Divisions or the 5060th Transportation Squadron of the United States Air Force; or (2) while in or upon any premises or surface vehicle used for passengers and provided or arranged for by such airline or the authorities controlling an established airport, but only while the Insured is in or upon such premises or surface vehicle for the purpose of beginning, continuing or completing the airtrip designated in the Schedule.

Form T6AV - Series 597S

Travis Air Force Base, California
27 February 1959

REVOCABLE PERMIT

The Base Commander, Travis Air Force Base, for and on behalf of the United States, hereby grants to the Travis Air Taxi Service, hereinafter referred to as TAS, a permit to use without charge the aircraft landing and parking facilities at Travis Air Force Base, California for the express purpose of providing air taxi service from Travis Air Force Base to the San Francisco bay area. Said permit shall be subject to and limited by the following terms and conditions:

I

GENERAL:

This permit does not purport to grant any exclusive franchise or license to TAS concerning the services contemplated hereunder. It is expressly understood that no exclusive rights inure to TAS by reason hereof.

II

DURATION:

This permit shall be effective until terminated, as follows:

A. The parties named above may mutually terminate at any time.

B. Either party may terminate upon thirty days' written notice, at will.

C. The Commander, Travis Air Force Base, may terminate immediately, without notice, upon noncompliance by TAS with any of the terms and conditions set forth below.

D. The Commander, Travis Air Force Base, may terminate immediately, without notice, when he de-

termines in his sole discretion that an emergency condition exists or that operational necessity makes continuation of the permit unfeasible.

III

SEAT PRIORITY:

The following seat priorities will be maintained:

A. FIRST PRIORITY:
Department of Defense personnel travelling on official orders at the expense of the United States Government.

B. SECOND PRIORITY:
Military personnel travelling on emergency leave.

C. THIRD PRIORITY:
All Department of Defense personnel, including contract employees and dependents thereof.

D. FOURTH PRIORITY:
Non-priority seating will be on a first-come, first-serve basis.

IV

PRICES:

The maximum prices which TAS will charge are as follows:

A. Travis AFB to San Francisco-- $15.00 per seat

B. Travis AFB to Oakland ------- 15.00 per seat

C. Charter rates, Travis AFB to San Francisco or Oakland, single engine aircraft ---------- 37.50

D. Charter rates, Travis AFB to San Francisco or Oakland, twin engine aircraft ---------- 75.00

V

SERVICE

Aircraft will be non-scheduled and will depart at discretion of TAS. However, weather conditions permitting, flights will depart after no longer than two hours after one passenger has contracted for the flight service.

VI

PROTECTION OF GOVERNMENT:

TAS will sign and maintain current-in-effect the standard Hold Harmless Agreement, AF Form 180.

VII

INSURANCE:

A. TAS will maintain at all times a minimum of $50,000 liability Insurance per person in respect to any passenger of any flight undertaken by the company.

B. The insurance coverage shall indicate the United States as an insured party.

C. TAS will assure that the insurer will not invoke the defense of sovereign immunity and such condition will be included in the terms of the policy. A copy of the policy will be sent to the Base Transportation Office, Travis Air Force Base, California.

VIII

FUEL AND MAINTENANCE:

TAS will refuel, obtain ordinary repairs and maintenance (other than minor repairs) at airport facilities other than those at Travis Air Force Base, except under emergency conditions.

IX

FLIGHT AND GROUND RULES:

TAS will comply with all flight and ground rules as are now or may hereinafter be established by the Base Commander, Travis Air Force Base, or other designated Air Force official.

X

PARKING AIRCRAFT:

The aircraft of said company will be parked in areas designated by the tower. When conditions permit, the aircraft will be parked as close to the passenger entrance as possible.

XI

SOLICITATION OF TRADE:

TAS will solicit trade only in a prudent manner, acceptable to the Base Commander, and then only in the facilities presently occupied by the E and J Travel Agency at the Base Terminal.

XII

CONDUCT OF EMPLOYEES:

TAS will be responsible for the conduct, actions, and neat appearance of all employees.

XIII

COMPLAINTS:

Complaints and disagreements in re services will be referred to a senior member of TAS, and to the Base Transportation Officer.

XIV

NOTIFICATION OF ETA:

TAS agrees that all aircraft departing enroute to Travis will cause Travis Tower and the E and J Travel

Agency to be notified of their estimated time of arrival at or about their time of departure.

XV

OPERATING CONDITIONS:

A. Under no circumstances will one-engine aircraft be operated except in VFR flight rule conditions as defined by FAA rules.

B. TAS agrees to employ only competent and qualified FAA rule pilots and to maintain all aircraft in top mechanical condition.

C. TAS agrees to maintain a passenger manifest on all passengers, copies to be retained for a period of one year in a file located at the office of the E and J Travel Agency. Said file may be inspected by the Base Commander or his designate at any time.

XVI

SECURING AIRCRAFT:

Upon receipt by the E and J Travel Agency of reported adverse weather conditions, TAS will assure that its aircraft are properly secured.

XVII

ABORTIVE FLIGHTS:

Any abortive flights returning to point of origin will result in a complete refund to passengers or to the United States Government, where the service was contracted for the Government.

XVIII

LICENSE, ETC. REQUIREMENTS

TAS agrees to maintain current any and all licenses, permits, etc., required by law and regulation at its expense.

XIX

REPRESENTATION BY EMPLOYEES:

No officer or employee of TAS will represent himself in any manner as having any official connection with the United States Government or the United States Air Force.

XX

FURTHER CONDITIONS:

Further conditions may be hereinafter imposed by the Base Commander.

TRAVIS AIR TAXI SERVICE
/s/
President

APPROVED:
CHARLES W. STARK
Colonel, USAF
Commander

PRESIDENT

This is to certify that William S. Jamieson whose signature appears above, is an authorized officer of E & J TRAVEL BUREAU, INC., a Corporation, 715 Marin Street, Vallejo, California, and as such has been granted authorization by the Board of Directors to effectively bind and obligate said E & J TRAVEL BUREAU, INC., a Corporation.

SECRETARY

CORPORATION SEAL

APPROVED:

CHARLES W. STARK
Colonel, USAF
Base Commander

CHANGE #1 TO REVOCABLE PERMIT DATED 27 FEBRUARY 1959

1. The following changes to Revocable Permit dated 27 February 1959 are effective immediately:

a. Hereafter, the name Travis Air Taxi Service or TAS as it is amended to read Travis Transportation Company Incorporated "doing business as Golden Gate Airways."

b. With the above change, the Travis Transportation Company Incorporated hereby accepts and is bound by all of the provisions of the above reference Revocable Permit.

TRAVIS TRANSPOTATION CO. INC.

By: /s/ William S. Jamieson
President

APPROVED:

CHARLES W. STARK
Colonel, USAF
Base Commander

A TRUE COPY:
/s/ Robert D. Lichty
Captain, USAF
Commercial Transportation Officer

SUPPLEMENT #1 TO REVOCABLE PERMIT DATED 27 FEBRUARY 1959

1. In accordance with Section IX of Revocable Permit dated 27 February 1959, the following changes to GROUND AND FLIGHT RULES will be effective immediately:

a. All new pilots will be briefed by Travis Base Operations Officer prior to operating in and/or out of Travis Air Force Base.

b. When operating with passengers aboard from Travis Air Force Base, San Francisco International Airport, or Oakland airports with destination listed as any one of the above air fields and from Travis AFB to any other destination and a VRF flight plan is filed, the VFR flight will be conducted in accordance with Civil Air Regulations and the following stipulation.

(1) The reported ceiling and visibility for the departure base, en route, and airport of intended landing will be at least 1500 foot ceiling, prevailing ground visibility at least three miles, in forward flight visibility at cruising altitude at least five miles.

c. When landing at Travis AFB, the traffic pattern and altitude will be as prescribed in 323rd Air Division Supplement #1 to Air Force Regulation 55-19.

d. Passengers will wear seat belts at all times when the aircraft is in motion.

e. Aircraft filing into Travis AFB for a passenger stop will be required to file a new clearance if the passenger stop exceeds fifteen minutes.

f. Passengers will be carried on multi-engine aircraft only.

g. Aircraft filing into or out of Travis AFB will not operate when the crosswind component is above that established by the Base Commander for the type of aircraft operated.

h. United States Air Force personnel, as directed by the Base Commander, will periodically accompany the flights for the purpose of observing the operation and to insure adherence to the provisions of this permit.

Received by Travis Transportation Company Incorporated:

DATE_____ SIGNATURE_____

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,815

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION, APPELLANT

v.

JOSEPHINE L. MESSINA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided June 3, 1965

Mr. John Joseph Leahy for appellant.

Mr. Austin P. Frum, with whom *Messrs. Thomas S. Jackson, Robert M. Gray* and *John L. Laskey* were on the brief, for appellee.

Before EDGERTON and BASTIAN, Senior Circuit Judges, and BURGER, Circuit Judge.

PER CURIAM: This is an appeal from a judgment of the District Court, after trial, in favor of appellee, who sued as beneficiary to recover the face amount of an air travel insurance policy purchased by her husband from an agent of appellant at Tachikawa Air Force Base, Japan, before

embarking on a trip to Washington, D. C. He was fatally injured, while a passenger, by the crash of an air taxi between Travis Air Force Base and San Francisco International Airport. The question is whether the policy covered the taxi flight. The facts are fully stated in the District Judge's memorandum of April 24, 1964, as amended May 8, 1964. We agree with his opinion and therefore affirm the appealed judgment.

Affirmed.

BURGER, *Circuit Judge, dissenting*: The majority affirms the judgment of the District Court without undertaking any analysis of the issues. Since this is an important case and will probably affect the entire air travel insurance industry and its underwriting and actuarial bases I deem it imperative to analyze the issues so that what the court does will be apparent.

This is an appeal from a judgment of the District Court in favor of Appellee, who sued as beneficiary to recover the face amount of an air travel insurance policy purchased by her husband Messina from an agent of Appellant at Tachikawa Air Force Base, Japan, before embarking on a flight to Washington, D.C. The decedent was a civilian employee of the Department of the Army traveling on government travel orders. The travel orders covered passage from Tachikawa to Travis Air Force Base, California, on a commercial carrier flight contracted for by the Military Air Transport Service (MATS). On his arrival at Travis, Messina bought a United Airlines ticket from San Francisco to Washington with a government transportation request. With $15 of his own money he obtained a ticket for an air taxi flight operated by Travis Transportation Company, Inc., a nonscheduled carrier op-

erating between Travis Air Force Base and San Francisco International Airport. The air taxi crashed, fatally injuring Messina.

The only issue before the District Court, and before us on appeal, is whether the insurance policy covered the fatal flight. No fact issues are involved; stipulations of the parties have narrowed the issue to whether the air taxi flight between airports was one "contracted for by . . . the Military Air Transport Service (MATS) of the United States"; if so, it was expressly covered by the words just quoted from the policy.

Appellant's primary contention is that a document styled "Revocable Permit" to authorize landings and take-offs by the air taxi company and issued by one Colonel Stark, an officer assigned to MATS, is a MATS "contract" within the terms of the insurance policy and that flights of the air taxi are therefore flights "contracted for by . . . the Military Air Transport Service . . . of the United States." I think this theory untenable. The revocable permit is simply a consent to the use, without charge, of the air base facilities by the air taxi company for the purpose of providing air taxi service under conditions laid down in the document. It was issued by Col. Stark as the "Base Commander, Travis Air Force Base, for and on behalf of the United States."[1] MATS is not mentioned in the permit.

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[1] Undisputed testimony establishes that Col. Stark was serving a maintenance function unrelated to the characteristic MATS function of providing air transportation to military personnel. Thus at the time Col. Stark issued the permit, MATS happened to be the "host" command at the Travis base. As "host," MATS was responsible for the operations of the Base, including authority to issue permits for all aircraft to land and take off at the Base. Appellee's argument thus rests on the fortuity that MATS was the housekeeping unit for the Air Force at Travis when the

Whether there is evidence to support the contention of Appellee, adopted by the District Court, that the taxi flight was "contracted for" by MATS depends upon the document constituting the taxi license read against the background shown by this record.

Appellee put in evidence a deposition taken by Appellant from the MATS commandant, General Kelly, to the effect that

> Airlift contracted by and for MATS is . . . furnished by a commercial carrier pursuant to a contract between the carrier and the U.S. Government, represented by MATS as an airlift service agency . . . . The contract defines the terms of service to be provided and the price to be paid therefor by the government.

In addition to this affirmative definition of what constitutes MATS-contracted-for air carriage there is similarly undisputed testimony of the president of the air taxi company that his taxi service was not "under contract" with MATS.[2] His views are not controlling; but when neither of the two alleged "contracting" parties considers that they have contracted, and the claim of a contract is made only by a *third* party, a legal stranger to the alleged con-

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permit was issued; had the permit been issued at an earlier date, it would have emanated from a unit of the Strategic Air Command.

[2] In view of the unchallenged testimony discussed in the text, I find inexplicable the District Court's assertion that "If the ordinary person in Mr. Messina's position had inquired whether the flight was . . . 'contracted for' by MATS, he would have been shown a document called a 'Revocable Permit.'" The record seems to me to indicate clearly that those to whom such an inquiry might appropriately have been directed—i.e., the spokesmen for the supposed "contracting" parties—believed the taxi license to have nothing whatever to do with the existence of a contract of carriage such as the insurance policy contemplated.

tracting parties, I should think a court would need something resembling evidence in order to spell out a contract, especially when such important rights are rested on the claimed contract. Even if it is assumed *arguendo* that the revocable operating permit has some characteristics of a "contract" in a purely technical sense, we must recognize that the issue is not simply whether that permit is a contract but whether *the particular air taxi flight* from one terminal to the other was one "contracted for" by MATS within the meaning of the insurance policy. The record does not make it clear, but for the purposes of this opinion I am prepared to assume, that Messina could have been reimbursed by the government for the cost of the air taxi ticket; however, this does not resolve the critical issue whether *MATS* contracted for the fatal flight under the terms of the policy.

I have great difficulty in following the District Court's reasoning. As I read the opinion of that Court, however, it first sets out some examples of supposed ambiguities in the policy. (If those provisions are ambiguous, there are no unambiguous insurance policies.) From these examples the Court concludes that the contract should have had a provision warning clearly that the air-taxi flight was not covered. Having thus started to develop a position focusing on Messina's possible reliance on language thought misleading, the Court suddenly shifts into a discussion of the taxi-license-as-MATS-contract theory discussed above.

The Court seems to believe that its previous discussion concerning possible ambiguities in the contract bears on its technical analysis of the revocable-permit argument, for the opinion proceeds to that analysis "in the light of" its treatment of the supposed ambiguities and absence of warning. But the previous discussion of Messina's possible detrimental reliance is here out of place. It is hardly conceivable that Messina could have relied on *private* ar-

rangements for an air taxi service to use an air force base as amounting to a MATS "contract" within his insurance coverage; he simply would not have known of such arrangements. For this reason I believe the first part of the District Court's opinion—that dealing with Messina's possibly being misled by ambiguities—cannot come to the aid of the second part—the agonizingly strained interpretion which construes the revocable permit into a MATS "contract." So viewed, the taxi-license argument must stand or fall on its own. And it must fall, as I have indicated above.

No language in the policy suggests—and I do not think a reasonable traveler who reads his policy would believe that a nonscheduled "air taxi" flight between airports was covered by a policy which in the boldest type restricts coverage to "Scheduled Airlines." To succeed, Appellee must show—and has not—that some provision of the policy her husband purchased provided coverage for inter-airport travel by nonscheduled air service. Such coverage must first be found within the insuring clause and second it must not be excluded by any specified exceptions or exclusions. By one of the policy's express terms[3] the insured is covered "while riding as a passenger in, boarding or alighting from, or by being struck by an aircraft operated . . . by a scheduled airline . . . by, or contracted for by, the Military Air Transport Service (MATS) of the United States . . . or . . . while in or upon any premises *or surface vehicle used for passengers and provided or arranged for by such airline or the authorities controlling an established airport, but only while the Insured is in or upon such premises or surface vehicle for the purpose of beginning, continuing or completing the airtrip designated in the Schedule.*" (Emphasis added.)

Thus the policy deals in precise and explicit terms with

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[3] Following is a copy of the face of the contract:

This Policy Is Nonrenewable and Provides Benefits for Loss of Life, Limb or Sight and Other Specified Losses Resulting from Accidental Bodily Injuries Received While a Passenger on Scheduled Airlines and Other Specified Conveyances or While on the Premises of an Airport to the Extent Herein Provided.

Assessment Association Pltfs. Exhibit No. 1

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION

OMAHA, NEBRASKA

(Herein called the Association) JUL 27 1964 Evidence

SCHEDULE Policy T6AV **No** 18228 A

(PLEASE PRINT)

Insured's Name SALVATORE H. MESSINA

Street 4103 - 41 ST. City BRENTWOOD State MD

Beneficiary's Name JOSEPHINE L. MESSINA

Street SAME City ~~WASHINGTON~~ State ~~DC~~

Point of Departure TAW Destination WASHINGTON DC ☐ And Return

Principal Sum $ 50,000 Effective Date 25 Jan. 60 Premium $ 4.00

In consideration of the payment of the premium shown in the Schedule, the Association, subject to the provisions, limitations and exceptions of this policy, hereby insures the person named as Insured in the Schedule against loss of life, limb or sight and other specified losses resulting, independently of all other causes, from injuries. The term "injuries", wherever used in this policy, shall mean accidental bodily injuries received during any portion of the first one way or round trip which is made by the Insured, while this policy is in force, between the Point of Departure and the Destination designated in the Schedule and for which the Insured has purchased a transportation ticket or has been issued a pass; provided such injuries are received (1) while riding as a passenger in, boarding or alighting from, or by being struck by an aircraft operated on a regular, special or chartered flight (a) by a scheduled airline of United States Registry holding a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board of United States of America or its successors, (b) by an intrastate scheduled airline of United States Registry maintaining regular published schedules and licensed for the transportation of passengers by a duly constituted authority having jurisdiction over civil aviation in the state in which said airline operates, (c) by a scheduled airline of foreign registry maintaining regular published schedules and licensed for transportation of passengers by the duly constituted governmental authority having jurisdiction over civil aviation in the country of registry of such airline, (d) by, or contracted for by, the Military Air Transport Service (MATS) of the United

Form T6AV - Series 597S

States, (e) by the Royal Canadian Air Force Air Transport Command or the Royal Air Force Air Transport Command of Great Britain, or (f) by the 315th or 322nd Air Divisions or the 5060th Transportation Squadron of the United States Air Force; or (2) while in or upon any premises or surface vehicle used for passengers and provided or arranged for by such airline or the authorities controlling an established airport, but only while the Insured is in or upon such premises or surface vehicle for the purpose of beginning, continuing or completing the airtrip designated in the Schedule.

inter-airport transportation and the scope of insurance coverage between connecting flights; it carefully and plainly limits insurance coverage to *surface* vehicles operated by or for covered airlines and airports, and obviously an air taxi is not such. As to what the insured probably understood, assuming for the moment that is relevant, I suggest that no person capable of reading could have been "misled" or in doubt. As to how judges ought to construe this contract language, we have the ancient and universally accepted axiom of construction, "expressio unius, exclusio alterius." Unless we ignore both the language of the policy and the canons of construction I fail to see how we can sustain the judgment, for here we have a contract carefully drawn to cover only *one form* of inter-airport travel, *i.e.*, by *specified "surface* vehicles."

The only way we can sustain this award is to rewrite the contract, and the majority does this *sub silentio*.[4] That this is what is being done is shown by that portion of the policy reproduced by facsimile in the margin. See n.3, *supra*.

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[4] As an appellate court we need no specific record evidence to recognize that insurance actuaries, in calculating premiums on insurance, must gauge the premium to the scope of the risk. It is similarly well within the range of judicial notice that the risks of the relatively unregulated nonscheduled air taxis operating in and around airports are greater than the readily measurable risks of travel on regularly scheduled and rigidly supervised airlines. The cost of air travel insurance covering scheduled airlines is only a fraction of the cost for comprehensive coverage for air travel generally.

Apart from the erroneous result in this case the majority has approved an interpretation of a standard form of air policy which could easily have wide reverberations in the underwriting of air travel insurance generally because the court now blankets the more hazardous nonscheduled travel under coverage obviously calculated on the risks of scheduled

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airlines. If, as is now held, nonscheduled air taxis are covered by this policy, it may well be argued that nonscheduled flights generally are covered; no legal distinction can be seen between a nonscheduled air taxi flight between two airports and a nonscheduled flight from California to New York.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MRS. JOSEPHINE L. MESSINA
5605 Patterson Road
Riverdale Heights, Maryland
Plaintiff,

v.

MUTUAL BENEFIT HEALTH &
ACCIDENT ASSOCIATION
Ring Building
Washington, D. C.

Civil Action
No. 3776-60

[Filed April 24, 1964]

MEMORANDUM

This is a suit by the beneficiary of a life insurance policy against the defendant insurance company for the proceeds of a $50,000 policy purchased by plaintiff's husband while en route from Korea to his home in Maryland. The issue is whether the flight which crashed, killing plaintiff's husband, was within the risks covered by the policy,

Salvatore Messina, a civilian employee of the Department of the Army, Corps of Engineers, was employed as a construction representative in Seoul, Korea, in January 1960. Due to a reduction in force, Mr. Messina was ordered back to his home in Brentwood, Maryland. His travel from Seoul, Korea, to Maryland was pursuant

to Government travel orders. Mr. Messina travelled from Korea to Tachikawa Air Force Base, Japan, and there he purchased from the defendant herein a policy of insurance in the face amount of $50,000, naming his wife as beneficiary. He mailed the policy to his wife at his home address. Mr. Messina flew from Tachikawa Air Force Base to Travis Air Force Base, California, on a commercial air carrier on a flight contracted for by the Military Air Transport Service (MATS). Upon his arrival at Travis, on January 25, 1960, Mr. Messina purchased, with a Government transportation request, a ticket on a United Airlines flight from San Francisco International Airport to Washington, D.C. Mr. Messina also purchased, with $15 of his own money, a ticket on a flight operated by Travis Transportation Company, Inc., from Travis to San Francisco International Airport; Travis and San Francisco Airport are about sixty-seven miles apart, and the flight was by "air-taxi" — a non-scheduled service operating between the two airports. The plane on which Mr. Messina was riding crashed en route to San Francisco International Airport, and Mr. Messina suffered fatal injuries. The plaintiff, his widow, gave timely notice to the defendant and submitted the required proof of loss within the ninety-day period after Mr. Messina's death. On March 16, 1960, the defendant notified Mrs. Messina that it denied her claim on the ground that Mr. Messina was not covered under the terms of the policy. Thereafter the plaintiff filed her suit herein.

The sole issue is whether the fatal flight was covered by the insurance policy which Mr. Messina purchased.

On the first page of the four-page form contract, the following words appear at the top in bold-face:

> This Policy is Nonrenewable and Provides Benefits for Loss of Life, Limb or Sight and Other Specified Losses Resulting from Accidental Bodily

> Injuries Received While a Passenger on Scheduled Airlines and Other Specified Conveyances or While on the Premises of an Airport to the Extent Herein Provided. (Emphasis added.)

Then follows a "SCHEDULE," on which the purchaser fills in his name and address, the beneficiary's name and address, the point of departure, the destination, and the amount of the policy, the effective date, and the premium. On Mr. Messina's policy, the point of departure was listed as "TAW," which is the symbol for Tachikawa Air Force Base, Japan; the destination was listed as Washington, D. C.

The following language then appears in small but legible type beginning on the first page and running over to the second:

> In consideration of the payment of the premium shown in the Schedule, the Association, subject to the provisions, limitations and exceptions of this policy, hereby insures the person named as Insured in the Schedule against loss of life, limb or sight and other specified losses resulting, independently of all other causes, from injuries. The term "injuries," wherever used in this policy, shall mean accidental bodily injuries received during any portion of the first one way or round trip which is made by the Insured, while this policy is in force, between the Point of Departure and the Destination designated in the Schedule and for which the Insured has purchased a transportation ticket or has been issued a pass; provided such injuries are received (1) while riding as a passenger in, boarding or alighting from, or by being struck by an aircraft operated on a regular, special or chartered flight (a) by a scheduled airline of United States Registry holding a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board of the United States of Ameri-

ca er its successors, (b) by an intrastate scheduled airline of United States Registry maintaining regular published schedules and licenses for the transportation of passengers by a duly constituted authority having jurisdiction over civil aviation in the state in which said airline operates, (c) by a scheduled airline of foreign registry maintaining regular published schedules and licenses for transportation of passengers by the duly constituted governmental authority having jurisdiction over civil aviation in the country of registry of such airline, (d) by, or contracted for by, the Military Air Transport Service (MATS) of the United States, (e) by the Royal Canadian Air Force Air Transport Command or the Royal Air Force Air Transport Command of Great Britain, or (f) by the 315th or 322nd Air Divisions or the 5060th Transportation Squadron of the United States Air Force; or (2) while in or upon any premises or surface vehicle used for passengers and provided or arranged for by such airline or the authorities controlling an established airport, but only while the Insured is in or upon such premises or surface vehicle for the purpose of beginning, continuing or completing the air trip designated in the Schedule. (Emphasis added.)

All of the above provisions are in black ink, except for the portions of the "SCHEDULE" filled in with blue ink. In addition, in very light-faced, pale green printing, the following words appear:

Read Carefully
This Policy Is Limited
To Aircraft Accidents
on Scheduled Airlines

These words are set on a diagonal and are covered with the small black type of the long contractual provision

set out above, making both the green printing and the black printing over it difficult to read. A casual reader would be likely to fail to read the green type at all.

The issue in this case is whether the fatal flight was "a regular, special or chartered flight * * * contracted for by, the Military Air Transport Service (MATS) [1] * * *," since none of the other specified types of flights applies.

The Court has concluded, for reasons to be set forth hereinafter, that the fatal flight was covered by the insurance policy, and that plaintiff is therefore entitled to recover. [2]

It is hornbook law that ambiguities in a standard-form contract are generally to be resolved against the party who drafted the document. In this case, this prin-

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[1] It is conceded that the flight was not actually "by" MATS, thus limiting the issue to the above-quoted portion of the policy dealing with flights "contracted for" by MATS.

[2] At the request of the Court, the parties have briefed the question of which law should govern the substantive issues in this case. Defendant has argued that the law of Japan should govern, since the contract was purchased in Japan, and that since plaintiff has offered no proof of Japanese law, the case should be dismissed. The Court, however, agrees with plaintiff that it would be contrary to the intention of the parties and contrary to sound judicial administration to apply the law of Japan to the interpretation of this contract when the contract was purchased by an American citizen passing through Japan on his way back to the United States to his permanent residence in Maryland, and was sold by an American insurance company with home offices in Nebraska. See Auten v. Auten, 308 N. Y. 155, 124 N.E.2d 99 (1954). American Contract law will therefore be applied. The Court need not decide which American jurisdiction governs, since neither party has suggested that the courts of any one state would decide the issues presented herein any differently from the courts of other states. In any event, the court would be justified in assuming that Japanese law contains the same governing principles of the law of contracts.

ciple requires this Court to construe the insurance policy liberally in favor of the purchaser and his widow, the plaintiff herein. *Smith v. Indemnity Ins. Co.*, 115 U.S. App. D.C. 295, 298 (1963). The policy must therefore be interpreted from the point of view of the ordinary understanding of a reasonable person in the position of Mr. Messina at the time of purchase. "We all know that a contract of insurance, drawn by the insurer, must be read through the eyes of the average man on the street or the average housewife who purchases it. Neither of them is expected to carry the Civil Aeronautics Act or the Code of Federal Regulations when taking a plane." *Lachs v. Fidelity & Cas. Co.*, 306 N.Y. 357, 118 N.E.2d 555, 558 (1954).

There are a number of important ambiguities in the policy. First, there is a clear conflict between the light green print, which limits coverage to scheduled airlines, and the boldface heading and body of the contract, both of which are broader in coverage, including flights by MATS, which may well be non-scheduled. Second, the policy specifically covers all "regular, special or chartered" flights by the designated airlines, while the light green print limits coverage to scheduled airlines; to the ordinary reader, these provisions would appear to conflict with each other, since such reader would be unlikely to differentiate chartered flights run by "scheduled" airlines from chartered flights run by "non-scheduled" airlines. In short, the fact that coverage extends to "regular, special, or chartered" flights would be more important to the ordinary reader than the limitations as to various kinds of airlines, the technical definitions of which would not be understandable even to a diligent reader. The reference to "special" and "chartered" flights would have led a reasonable person in Mr. Messina's position to believe that the air-taxi flight was covered — unless some clear warning to the contrary can be discovered in the terms of the policy.

No such clear warning exists. In fact, other provisions in the policy would have reinforced the conclusion that the air-taxi flight was covered. Three specific references to coverage for the entire airtrip described in the "SCHEDULE" (filled in by the purchaser) would have led the ordinary reader in Mr. Messina's position to conclude that all connecting flights between the "point of departure" (Tachikawa) and the "destination" (Washington, D. C.) would be covered. Two of these references are quoted above: one extending coverage to injuries received "during any portion of the first one way or round trip which is made by the Insured * * * between the Point of Departure and the Destination designated in the Schedule * * *;" the other dealing with ground transportation "for the purpose of beginning, continuing or completing the airtrip designated in the Schedule." (Emphasis added.) The third reference is in the policy clause dealing with the effective date of the policy: "This insurance shall commence on the Effective Date at 12:01 A.M., Standard Time at the Point of Departure, and shall terminate either upon completion of the airline trip described in the Schedule or upon expiration or surrender for refund or credit of said transportation ticket, but in no event shall this insurance extend beyond a period of twelve months." (Emphasis added.) The impression left by these provisions that the policy covers the complete airtrip from point of departure to point of destination is made even stronger by the fact that defendant has conceded that both the completed trip from Japan to Travis Air Force Base and the projected trip from San Francisco to Washington, D. C. are specifically covered by the policy. It thus would have required clear warning that an intermediate air-taxi flight would not be covered in order to exempt the flight from Travis to San Francisco from the continuous coverage implied in the policy. Not only is such warning completely missing; even if it had existed it would have been made ambiguous and obscure by the specific cover-

age extended to "special" and "chartered" flights, as discussed above. [3]

There is one further fact which bears upon the proper interpretation of this policy. Mr. Messina filled in the name and address of his wife on the back of the policy, and mailed it to her before he left Tachikawa Air Force Base in Japan. The company provided no duplicate, so that when Mr. Messina arrived at Travis and decided to take the air-taxi flight, he would have had only his memory to tell him whether or not the air-taxi flight was covered under the policy. In these circumstances, the impression that the policy covered the continuous flight from Japan to Washington, D. C. would have been stronger than ever. See *Steven v. Fidelity and Cas. Co.*, 27 Cal. Rptr. 172, 377 P.2d 284, 294 (1962), where the fact that an insurance policy had been mailed influenced the court in concluding that an air-taxi flight was covered.

It is in the light of these considerations that the Court must interpret the proviso that the air-taxi flight is covered only if it is a flight "contracted for by the Military Air Transport Service (MATS) * * *." If the ordinary person in Mr. Messina's position had inquired whether the flight was or was not "contracted for" by MATS, he would have been shown a document called a "Revocable Permit." This document, signed by the Base Commander of Travis Air Force Base (a base assigned at the

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[3] The fact that the Army considered Mr. Messina to be in "duty status" until his arrival at Brentwood, Maryland, reinforces the conclusion that his entire trip was a continuous one. This conclusion is fortified by the additional fact, supported by regulations offered in evidence by plaintiff, that Mr. Messina could have been reimbursed for the air-taxi flight out of Army funds. However, the Court is not relying upon these facts as essential to its decision. The Court need not pass upon defendant's objections to these conclusions, advanced on various evidentiary grounds; if it were necessary to pass upon these items of evidence, defendant's objections would be overruled.

time to MATS; the commander was an officer of MATS), and by the President of Travis Air Taxi Service, permitted the Air Taxi Service to use without charge the landing and parking facilities of the base "for the express purpose of providing air taxi service from Travis Air Force Base to the San Francisco bay area." The document did not purport to grant the Air Taxi Service exclusive rights. The permit was to be effective "until terminated," either mutually at any time, by either party on thirty-day written notice, or by the Base Commander for non-compliance or emergency conditions. In return for the right to land and take off, the Air Taxi Service agreed to transport passengers on the following priority basis:

> FIRST PRIORITY: Department of Defense personnel travelling on official orders at the expense of the United States Government.
>
> SECOND PRIORITY: Military personnel travelling on emergency leave.
>
> THIRD PRIORITY: All Department of Defense personnel, including contract employees and dependents thereof.
>
> FOURTH PRIORITY: Non-priority seating will be on a first-come, first-serve basis.

The document set maximum prices. It also incorporated by reference certain FAA safety requirements, and in a supplment specified minimum visibility ceilings more stringent than those required by the FAA. According to the supplement, passengers were to be carried on multi-engine aircraft only. In addition, the following provision governed the service to be provided:

> Aircraft will be non-scheduled and will depart at discretion of [Travis Air-Taxi Service]. However, weather conditions permitting, flights will depart after no longer than two hours after one passenger has contracted for the flight service. (Emphasis added.)

Both parties agree that a contract is an agreement between two or more parties to do (or not to do) a certain thing, based upon sufficient consideration. Even though the Air Taxi Service and the Base Commander did not label the above document a "contract," it has all the essential elements of a contract, at least from the point of view of a reasonable man in Mr. Messina's position had he been shown the document. There is benefit flowing to both parties — to the Air Taxi Service from the fares it can collect from persons flown from Travis; to the Base Commander (and MATS) from the quicker connections between air fields and the priority seating arrangements.[5] There is also a detriment to each party — to the Air Taxi Service in being bound to supply service no longer than two hours after one passenger has requested the service; and to MATS in the wear and tear upon the runways and other facilities. In return for the promise by the Air Taxi Service to provide service even when there was only one person desiring it, and to provide such service on a priority basis, the Base Commander promised for MATS to let the Air Taxi Service use the facilities of the base. So long as the

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[5] In a memorandum dated February 2, 1959, (offered in evidence by plaintiff) from the Base Commander to the Military Traffic Management Agency, the Base Commander described in great detail the connecting services available between Travis and San Francisco Airport in his request for permission to grant approval to the Air Taxi Service to begin operations between the two airports. Defendant objects to the admission into evidence of the opinion of the Base Commander that existing surface connections were inadequate since the Base Commander was not present for cross-examination; but defendant does not object to the admissibility of the supporting factual data — indicating surface travel times varying between one hour and three-quarters to three hours and one-half. This factual data speaks for itself in supporting the Court's conclusion that MATS received a benefit from granting the Air Taxi Service the right to operate between Travis and San Francisco Airport.

agreement was in force, each party was obligated, and each benefited. The essential requisites of a contract were thus present.[6] This Court has therefore concluded that for the purposes of determining whether this flight was covered by the insurance policy, the flight was one "contracted for by" MATS.[7]

Considering the insurance policy as a whole and the governing principles of law, this Court has concluded that plaintiff has sustained her burden of proving by a fair preponderance of the evidence that she is entitled

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[6] Defendant argues that the Base Commander had no authority to "contract" on behalf of MATS, although he does not question the fact that the Base Commander had authority to issue the so-called "revocable permit." Since the Base Commander did have authority to do what he did in issuing the permit, and since the Court has construed that permit as a contract for the purposes of this case, any lack of authority to "contract" on behalf of MATS in some other regard is irrelevant to this case. In any event, since the issue in this case is whether a reasonable man in Mr. Messina's position would have interpreted the insurance policy as covering this flight as one "contracted for by" MATS, such a reasonable man would have been justified in relying upon the Base Commander's apparent authority (as distinct from actual authority) in "contracting" on behalf of MATS.

[7] Differences between the language of the insurance policy in the present case and policies in other cases, cited both by plaintiff and defendant, make the other cases not persuasive on the issues presented in the present case. See McBride v. Prudential Ins. Co., 147 Ohio St. 461, 72 N.E.2d 98 (1947) (interpreting "regularly scheduled passenger flight of a commercial aircraft" to bar coverage of a plane hired for a hunting trip); Lachs v. Fidelity & Cas. Co., 306 N.Y. 357, 118 N.E.2d 555 (1954) (holding the words "scheduled airline" ambiguous enough to extend coverage to the particular flight involved, an "Airline Trip Insurance" policy purchased from an automatic vending machine); Thompson v. Fidelity & Cas. Co., 16 Ill. App.2d 159, 148 N.E.2d 9 (1958) (interpreting "scheduled air carrier" as excluding coverage of the particular flight involved). None of these cases involved the phrase: flights "contracted for by" MATS.

to recover the proceeds of the insurance policy purchased by her husband.

The Court will also award plaintiff interest on the face amount of the policy from March 16, 1960, the date on which the defendant company rejected plaintiff's demand. This award of interest is required by D.C. Code §28-2707,[8] since the face amount of the policy is a liquidated amount, and since interest is payable by law or usage in such cases, 3 Appleman, Insurance Law and Practice § § 1581-1584 (1941 ed.). Defendant argues that D.C. Code § 28-2709,[9] permitting discretionary interest, applies. "But that provision [D.C. Code §28-2708] is not applicable where the action is for recovery of a liquidated indebtedness. In such case section 28-2707 D.C. Code (1951) applies." Blustein v. Eugene Sobel Co., 105 U. S. App. D. C. 32, 36 (1959). See also Rosden v. Leuthold, 107 U.S. App. D.C. 89, 92 (1960). Plaintiff would be entitled to interest from the date of demand and proof of death. See Royal Indemnity Co. v. Woodbury Granite Co., 69 App. D.C. 364, 369 (1938); 3 Appleman, Insurance § 1584. But apparently plaintiff does not know the actual date of demand, and is content to request interest

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[8] "In an action in the United States District Court for the District of Columbia to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid." D.C. Code § 28-2707.

[9] "In an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of the judgment only; but nothing herein shall forbid the jury, or the court, if the trial be by the court, from including interest as an element in the damages awarded, if necessary to fully compensate the plaintiff. * * *" D.C. Code §28-2708. Even if this provision did apply in the present case, the Court would award such interest since it is necessary "to fully compensate the plaintiff" for the amount which the proceeds could have earned since the time when such proceeds were due and payable.

only from the date the demand was rejected. Since the insurance policy specifies no rate of interest, the statutory six per cent per annum will be applied. D.C. Code § 28-2701.

Judgment will therefore be entered in favor of plaintiff in the amount of $50,000 plus interest at six per cent per annum from March 16, 1960.

This memorandum will be considered as findings of fact and conclusions of law pursuant to Rule 52, Federal Rules of Civil Procedure.

/s/ Judge Luther W. Youngdahl

April 24, 1964

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 839

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION,
Petitioner,

v.

JOSEPHINE MESSINA, *Respondent*

RESPONDENT'S REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

In the opinion of respondent, the following questions are presented by this Petition for Certiorari:

1. Does the interpretation by the U. S. District Court and the U. S. Court of Appeals for the District of Columbia Circuit of certain language in an insurance policy present "special and important" reasons for the granting of a writ of certiorari?

2. Should a writ of certiorari be granted for review of a purported "conflict of laws" question where the petitioner, who contends that Japanese law applies, has never offered to prove Japanese law and does not even now contend that the result would be different under Japanese law?

STATEMENT OF THE CASE

Respondent's husband, Salvatore Messina, was killed in an airplane crash on one segment of an air trip from Japan to Washington. Prior to his departure from Japan the deceased purchased an insurance policy for the trip issued by the petitioner and naming the respondent as beneficiary.

Petitioner denied coverage on the ground that the fatal flight was not within the terms of the policy and respondent later brought suit in the U. S. District Court for the District of Columbia seeking to recover the proceeds of the policy. At the trial respondent introduced evidence in support of her position; petitioner offered no evidence. The District Court, in a lengthy opinion, found for the respondent. 228 F. Supp 865 (App. 20-32). Judgment was affirmed by the United States Court of Appeals for the District of Columbia Circuit, *per curiam,* with one judge dissenting. 350 F. 2d 458 (App. 11-19).

ARGUMENT

I

The Construction of an Insurance Policy by the District Court and the Court of Appeals Involves No "Special and Important" Reasons Which Would Justify the Granting of a Writ of Certiorari

It is well-established that this Court, in reviewing or deciding whether to review the decisions of the United States Court of Appeals for the District of Columbia Circuit, will exercise great restraint and will review such decisions only where the question presented is one of national importance rather than a matter of local law. *Griffin* v. *United States,* 336 U.S. 704, 716, 93 L. ed. 993, 1000 (1949); *Fisher* v. *United States,* 328 U.S. 463, 476, 90 L. ed. 1382, 1390 (1946); *cf. Del Veccio* v. *Bowers,* 296 U.S. 280, 80 L. ed. 229 (1935). It is similarly axiomatic that certiorari will not be granted where the question presented, even if it involves a Constitutional issue, is of importance only to the litigants. *Rice* v. *Sioux City Memorial Parks Cemetery,* 349 U.S. 70, 99 L. ed. 897 (1955).

The petitioner itself recognizes that "the only issue in this case is whether the insurance policy covered the fatal flight." (Pet. 9). Thus, no statute or principle of Common Law is involved but simply the construction of a contract between two private parties. This issue has been fully briefed and argued before the United States District Court and the United States Court of Appeals for the District of Columbia Circuit, and both Courts have ruled adversely to the petitioner, presenting no issue which would justify the granting of a writ of certiorari.

In an effort to introduce some sense of national significance into this case, petitioner states that the lower

courts' finding that the fatal flight was one within the terms of the policy is in conflict with cases holding that the Government may not be bound by the apparent authority of an officer purporting to act in its behalf. (Pet. 8-9). In all the cases cited by the petitioner, however, the Government was a party to the litigation and was raising its agent's lack of authority to bind it upon a particular contract. In the instant case, on the contrary, the Government is not a party and has never taken any official position in this litigation or elsewhere with respect to the validity of the document in question. As was stated by Mr. Justice Jackson, dissenting in *Federal Crop Insurance Corporation* v. *Merrill,* 332 U.S. 380, 387-388, 92 L. ed. 10, 17 (1947), the defense of lack of actual authority of a Government official is a "one way street" upon which only the Government may travel. Even a party having direct contractual relations with the United States may not raise the issue of the Government agent's lack of authority. *Perkins* v. *Lukens Steel Company,* 310 U.S. 113, 127-129, 84 L. ed. 1108, 1114, 1116 (1940); *Hartford Accident & Indemnity Company* v. *United States,* 130 Ct. Cls. 490, 493 (1955). Thus, the holdings of the District Court and the Court of Appeals in this case have no application to the field of Federal Government contract law.

In a further attempt to breathe some air of broad importance into this case, the petitioner argues that the decision of the courts below will tend to raise the cost of accident insurance (Pet. 11). Petitioner complains that:

> "* * * the holding below pays no heed to the actuarial factors that enter into the obviously greater risks of the relatively unregulated nonscheduled air taxi." (Pet. 11-12).

The reason that the courts below did not consider the "actuarial factors" is quite simple: Petitioner presented no such evidence. The only evidence on the issue of the riskiness of the airline upon which the insured lost his life was introduced by the respondent and showed that this airline, by reason of the contract with MATS, was held to a standard of safety substantially in excess of the usual requirements of the Federal Aviation Administration. (R. 98-104; 125-128). The petitioner, having elected to offer no evidence upon this issue—or upon any issue—cannot now be heard to rely upon some vague, unspecified actuarial factors which it claims will have some effect upon insurance rates. These factors being within the peculiar knowledge of the petitioner and the petitioner having failed to offer them in evidence, it can be assumed that such factors would be unfavorable to the petitioner's case. *Washington Gas Light Company* v. *Biancaniello,* 87 U.S. App. D.C. 164, 167, 183 F. 2d 982, 986 (1950).

II

The Purported "Conflict of Laws" Issue Raised by Petitioner Has No Effect Upon the Outcome of This Case and, in Any Event, Is a Matter of Local Law Which Is Not a Proper Subject for Review by Writ of Certiorari

Petitioner contends that both the District Court and the United States Court of Appeals erred in ruling that Japanese law need not be applied to the interpretation of an insurance policy purchased by an American citizen, en route to the United States, from an American company, on a United States Air Force Base in Japan and naming an American citizen as beneficiary. The short answer to this contention is that the petitioner has never demonstrated, nor even argued, that the application of Japanese law would in any way

change the outcome of this case. Thus, there is no real "conflict" of laws question presented since no difference in result is alleged.

Even if the petitioner had offered some evidence to show that a different result would have been reached under Japanese law, thus presenting a true "conflict of law" question, this Court has consistently held that there need be no uniformity or consistency among the conflict of laws rules adopted by the various lower courts so long as the full faith and credit clause, or some other Constitutional provision, is not violated. *Wells* v. *Simonds Abrasive Company,* 345 U.S. 514, 516, 97 L. ed. 1211, 1215 (1953); *Clay* v. *Sun Insurance Office,* 377 U.S. 179, 12 L. ed. 2d 229 (1964). Petitioner does not even argue that the "conflict" question allegedly presented here rises to the dignity of a Constitutional issue.

CONCLUSION

This case involves the construction of certain language in an insurance policy which has been fully briefed and argued to both the District Court and the Court of Appeals. The narrow issue upon which both lower courts found for the respondent does not have that importance which would warrant a review by this Court. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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IN THE

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October Term, 1965

No. 839

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ACCIDENT ASSOCIATION
Petitioner

vs.

JOSEPHINE MESSINA
Respondent

PETITIONER'S REBUTTAL TO RESPONDENT'S REPLY BRIEF TO PETITION FOR CERTIORARI

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Not merely to have the last word, but by noting the chief distortions of the case rulings cited by the Respondent in her brief, the Petitioner seeks to aid the Court in passing upon the justification for the writ of certiorari requested herein. Within the few following pages the manner in which the Respondent has begged the federal questions raised in the petition will also be demonstrated.

I CONFLICT OF LAW RE APPARENT AUTHORITY OF GOVERNMENT OFFICER.

The first federal question discussed by the Petitioner in its brief was the holding of the courts below of the supposed apparent authority of a government officer (as distinct from actual authority) to bind MATS in contract for an air taxi flight; the one purchased by the insured herein which proved fatal.

A document alleged by the Respondent to be a MATS contract for the said flight is held to make the Petitioner liable to the Respondent. Neither the Respondent nor the Petitioner is a party to the alleged contract. Yet the Petitioner, according to the Respondent, cannot be heard to deny the alleged government officer's actual authority to bind MATS!

This absurd hypothesis is allegedly supported by the cited *Merrill* decision in which even the dissenting Mr. Justice Jackson did not subscribe to the glibly quoted "one way street" notion at all.

Similarly, this Court's holding in the *Perkins* case was incorrectly described by the Respondent. Therein, standing was denied to a party who was merely contemplating contractual relations with the government; not to a party who had engaged in any such relations either directly or indirectly.

II. THE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The gratuitous manner in which the courts below injected and passively approved the appellation "ambiguous" to three words in the policy was the second basis for the Petitioner's asking this Court to grant it a hearing.

These words were "regular, special or chartered" and were descriptively applied to six specific types of flights

enumerated immediately thereafter as included, not excluded, in the coverage.

Without attempting to resort to any recognized rule of construction to relieve an injustice that might be worked by such words, the policy was in effect rewritten *sub silentio*.

The propriety of this blatant departure from the accepted and usual course of judicial proceedings, raising another federal question, is completely ignored in the Respondent's brief. Petitioner can only trust that its request to this Court, in the exercise of its supervisory capacity over the courts below to correct this deviation, will not fall on equally deaf ears.

III. THE NATIONAL AND CONTINUING IMPORTANCE OF THE CASE.

As if to imply that this case is of no national importance, the rewriting by the courts of this popular and clearly stated insurance policy which she had not even alleged to be ambiguous, the Respondent, without any delineation, cites *Griffin v. U.S.* A reading of this decision however merely reveals that it upheld the right of the Circuit Court to formulate rules of evidence for the District of Columbia. *Fisher v. U.S.*, similarly cited, also pertained merely to a rule of peculiarly local concern.

As in *DelVecchio v. Bowers*, a workman's compensation decision, which this Court reviewed because its construction constituted a precedent of general application, Petitioner feels that this Court will likewise recognize the instant case as one of national concern.

The "quite simple" reason Respondent advances for the courts below not considering the actuarial factors has no support in its findings. As observed by the dissenting judge, however, it is within the scope of judicial notice that the obviously greater risks of the relatively unregulated non-scheduled air taxis is not offset by their

observance of a few safety standards which exceed F.A.A. requirements for heavier planes. A small plane naturally must approach a landing field from a higher altitude than a four-engine airliner; the former needs the greater altitude for adequate vision. At the same level its vision could not be equated with its larger brother due to its less comparable instrumentation.

IV. THE COURT'S INVOCATION OF A TRANSCENDENTAL BODY OF LAW OUTSIDE OF ANY PARTICULAR STATE.

In reply to this fourth federal question raised by the Petitioner, the Respondent resorts to another so-called short answer. She contends that the Petitioner has never demonstrated that the application of Japanese law would change the outcome.

This not only begs the question, but in trying to avoid the burden of proving her right to recover under the law of any jurisdiction overlooks the holding below that is in conflict with the decisions of this Court in *Klaxon*, cited in Petitioner's brief, which condemned the making of an independent determination of such a question without first regarding local law.

The rulings of this Court in *Erie v. Tompkins*, *West*, and *Huddleston*, requiring federal courts to ascertain and apply the state law which controls, have been violated herein. True, this Petitioner has not argued that Japanese law applies. Neither has it argued that the law of California where the fatality occurred, or Maryland, the Respondent's domicile, or the District of Columbia where the suit was brought, applies. It has merely maintained that the law of some country or state should be followed.

Petitioner does not contend that there must be "uniformity or consistency among the conflict of laws rules adopted by the various lower courts," nor does it contend the lower courts "erred in ruling that Japanese law need not be applied." The Petitioner does contend however

that (a) the courts below erred in failing to ascertain which substantive law was applicable, and (b) that the courts erred in applying a federal general common law, denominated "American contract law" rather than the law of a particular state or foreign country.

Respondent correctly asserts that there need by no uniformity or consistency among the conflict of laws rules adopted by the various lower courts. Indeed, no uniformity is possible since federal courts are bound to follow the conflict of laws rules of the forum. That, however, is exactly what was not done here, which raised the same federal question as in *Klaxon*. The Respondent's quotation from *Wells*, taken out of context, is misleading in that it fails to recognize therein the minimum standards that this Court insisted be observed. Those same minimum standards were ignored herein; namely, by totally disregarding any conflict of laws rule and by completely failing to ascertain the appropriate applicable body of substantive law.

In conclusion, the Circuit Court below failed to correct and thereby impliedly sanctioned a course of proceedings which was prohibited by this Court in *Erie v. Tompkins;* namely, an independent view by the federal courts of the substantive law to be applied. Considering the four major federal questions raised herein, it is little wonder that the dissenting judge protested this affirmance of a judgment of the District Court "without undertaking any analysis of the issues." The determination of the appropriate law becomes especially critical in a case such as this wherein the forum had no contact with either of the parties, or the policy sued on, other than being the locus in which the suit was brought.

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